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No. ...

IN THE

Supreme Court of the United States

October Term, 1982

AMADA ENTERPRISES, dba VIEW HEIGHTS CONVALESCENT HOSPITAL, *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Question Presented.

Whether this Court's rule in *NLRB v. Savair Manufacturing Co.* (414 U.S. 270 (1973)), has been emasculated by the Ninth Circuit's holding that a waiver of initiation fees which appears only on the face of the union's authorization cards was effective both before and after an NLRB election, even though there would have been no valid purpose in the union distributing or employees signing such a card after an election.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioners Amada Enterprises, dba View Heights Convalescent Hospital, B & E Convalescent Centers, Inc. and Convalescent Employers Service, Inc., dba Gardena Convalescent Center, and Cheviot Garden Convalescent Hospital, Inc., dba Cheviot Garden Convalescent Hospital respectfully pray that a Writ of Certiorari issued to review the judgments and opinions of the United States Court of Appeals for the Ninth Circuit entered in *NLRB v. Amada Enterprises, et al.* on June 14, 1982.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit is set forth below in Appendix "A" and has not yet been officially reported. The Decision and Order of the National Labor Relations Board ("NLRB") in *Amada Enterprises, dba View Heights Convalescent Hospital* is set forth in

Appendix "C" and is reported at 255 NLRB No. 13. The NLRB's Decision and Order in *B & E Convalescent Centers, Inc.* and *Convalescent Employers Service, Inc., dba Gardena Convalescent Centers* is set forth in Appendix "D" and is reported at 257 NLRB No. 25. The NLRB's Decision and Order in *Cheviot Garden Convalescent Hospital, Inc., dba Cheviot Garden Convalescent Hospital*, is set forth at Appendix "E" and is reported at 258 NLRB No. 177.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 14, 1982. This Petition for a Writ of Certiorari was filed within 90 days of such entry. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Sections 8(a)(1), 8(a)(5) and 9(c)(3) of the National Labor Relations Act (29 U.S.C. §158 *et seq.*) are set forth as Appendix "G" hereto.

STATEMENT OF THE CASE.

A. NLRB v. Amada Enterprises.

1. The NLRB Bargaining Order.

Pursuant to a petition filed by the union on December 31, 1979, a representation election was conducted at View Heights Convalescent Hospital on February 26, 1980. A majority of votes cast were for the union. The employer objected to the election. Upon review of the report of the Regional Director of the NLRB overruling Petitioner's objection to the election the NLRB adopted the Regional Director's findings and recommendations and certified the union as the exclusive bargaining representative for all of Petitioner's employees, excluding professional employees,

Registered Nurses, guards and supervisors. Thereafter, to obtain judicial review of its objections, Petitioner refused to bargain with the union. On March 19, 1982 the NLRB found that Petitioner's refusal to bargain violated Sections 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. Section 158, *et seq.*; "the Act"), ordered Petitioner to bargain with the union and sought enforcement of its order in the Court of Appeals for the Ninth Circuit. On motion of the NLRB, its petition was consolidated with its petitions in the matters of B & E Convalescent Centers, Inc. and Cheviot Garden Hospital, Inc. and, over Petitioners' objections, was submitted for decision without oral argument.

On June 14, 1982, the Court of Appeals issued a two-page memorandum decision enforcing the NLRB's order. At Petitioner's request, the Court stayed its mandate to permit the filing of this petition. Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, the Ninth Circuit has indicated that it will continue the stay in effect until this Court has ruled on the instant petition. A copy of the court's stay of its mandate is set forth in Appendix "B".

2. Statement of Facts.

Petitioner operates a convalescent hospital. In order to obtain support sufficient to justify the holding of an election, the union distributed authorization cards among Petitioner's employees and asked the employees to sign and return the cards.

The authorization card, which is set forth at Appendix "F", is actually a postage-free envelope. Printed on the inside of the envelope's enlarged cover flap are various campaign statements and instructions to employees on how to complete and return the card. Included in the instructions is the statement "you will not be charged any initiation

fee." The bottom portion of the envelope contains a printed statement of authorization, a signature space and an information form to be completed by the employee. The Union's offer of waiver of initiation fees is unexplained on the card.

B. NLRB v. B & E Convalescent Centers, Inc. and Convalescent Employers Service, Inc., dba Gardena Convalescent Centers.

The underlying facts and the manner in which this case proceeded to the Ninth Circuit for review are substantially identical to the facts in the case of Petitioner Amada Enterprises described in Sections A 1. and 2. above.

The NLRB adopted the Regional Director's December 11, 1980 Report overruling Petitioner's objections to the election and found Petitioner's subsequent refusal to bargain to be in violation of Sections 8(a)(5) and (1) of the Act. The NLRB sought enforcement of its July 27, 1981 bargaining order in the Court of Appeals for the Ninth Circuit.

C. NLRB v. Cheviot Garden Hospital, Inc., dba Cheviot Garden Convalescent Hospital.

The underlying facts in this case are also substantially identical to those in the case of Petitioner Amada Enterprises described in Sections A 1. and 2. above.

The NLRB adopted the Regional Director's January 9, 1981 report overruling Petitioner's objections to the election and found Petitioner's subsequent refusal to bargain to be in violation of Sections 8(a)(5) and (1) of the Act. The NLRB sought enforcement of its September 30, 1981 Bargaining Order in the Court of Appeals for the Ninth Circuit.

REASON FOR GRANTING THE WRIT.

The holding of the Ninth Circuit is in conflict with the decision of this Court in *NLRB v. Savair Manufacturing Co.* and also is in conflict with the application of the *Savair* rule by other circuits.

Petitioners argued before the Ninth Circuit that the union, by offering to waive its initiation fee by placing a waiver on its authorization cards, created a clear impression among employees that such offer could be accepted only by signing and returning the card before the election. The Ninth Circuit rejected this argument "[b]ecause the waiver unambiguously contains no reference to a pre-election time limit." (Appendix A, p. 2), and enforced the NLRB's bargaining order.

The impact of the Ninth Circuit's holding is that a union may distribute authorization cards to unrepresented employees during an election campaign and include on that card an offer to waive initiation fees, provided the card does not contain language which informs employees that the offer is effective only during the pre-election period.

The Ninth Circuit has decided this case by application of a rule which contravenes and severely limits in this circuit the rule announced by this Court in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973). By sanctioning the use of authorization cards which state only that fees will be waived, and by refusing to scrutinize the use of such cards so long as they do not contain language limiting the availability of the waiver to the pre-election period, the Ninth Circuit gives unions carte blanche to engage in the kind of campaign excesses which this Court held in *Savair* would impair employee free choice and paint a false picture of union support.

This Court's holding in *Savair* is grounded on the well-established principle that the procedures by which a collective bargaining representative is selected must be free of influences which will limit an employee's right to choose freely between representation and non-representation, or between competing unions. *General Shoe Corp.*, 77 NLRB 124, 21 LRRM 1337 (1948). In the same manner that employers cannot purchase or coerce employee support during an election campaign by unilaterally increasing fringe benefits, see *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 11 L.Ed.2d 435, 84 S.Ct. 457 (1964), this Court held in *Savair* that a union could not limit its offer to waive initiation fees to only those employees who sign authorization cards prior to an election:

> "By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign. . . .
>
> [W]hile it is correct that the employee who signs a recognition slip is not legally bound to vote for the union and has not promised to do so in any formal sense, certainly there may be some employees who would feel obliged to carry through on their stated intention to support the union. . . .
>
> Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice." 414 U.S. 277-78.

As the decision in *Savair* recognizes, a pre-election fee waiver offer is particularly troublesome because of the potential dual function served by union authorization cards. Such cards not only demonstrate union support, but, if gath-

ered in sufficient number, may also authorize collective bargaining without an election.

> "When the dissent says that '[t]he special inducement is to sign the card, not to vote for the union' and that treating the two choices as one is untenable, it overlooks cases like *NLRB v. Gissel Packing Co.* 395 US 575, 23 L Ed 2d 547, 89 S Ct 1918. There we held that the gathering of authorization cards from a majority of the employees in the bargaining unit may entitle the union to represent the employees for collective, bargaining purposes, even though there has been and will be no election, id., at 582-583, 23 L Ed 2d 547, and that rejection of that authorization by the employer is an unfair labor practice. Where the solicitation of cards is represented as being solely for the purpose of obtaining an election, a contrary result is indicated. Id., at 584, 606, 23 L Ed 2d 547. Thus the solicitation of authorization cards may serve one of two ends. Of course, when an election is contemplated, an employee does not become a member of the union merely by signing a card. But prior to the election if the union receives overwhelming support, the pro-union group may decide to treat the union authorization cards as authorizing it to conduct collective bargaining without an election. The latent potential of that alternative use of authorization cards cautions us to treat the solicitation of authorization cards in exchange for consideration of fringe benefits granted by the union as a separate step protected by the same kind of moral standard that governs elections themselves." 414 U.S. 279-280. See also, *NLRB v. Con-Pac, Inc.*, 509 F.2d 270, 272 (5th Cir. 1975).

In the instant case, the union's authorization card contained the following statement:

> "I authorize the Hospital and Service Employees Union, Local 399, AFL-CIO to represent me for pur-

> poses of collective bargaining with my employer, *and the Union may request recognition and bargain on my behalf with my employer on wages, fringe benefits and working conditions.*" (Emphasis added.)

Thus, the union, when it receives cards from employees, is authorized to seek recognition immediately. Therefore, the latent potential for avoiding an election entirely and the resulting need to scrutinize the use of the card are clearly present in this case.

Where, as here, the waiver of initiation fees is printed directly on the face of the card, it stands to reason that such a case deserves even closer scrutiny than cases in which the waiver was offered orally contemporaneous with the distribution of the card, see *e.g., Fort Smith Outerwear, Inc. v. NLRB*, 499 F.2d 223 (8th Cir. 1974), or where the offer was made either before or after the card was distributed, see *e.g., NLRB v. Aladdin Hotel Corp.*, 584 F.2d 891 (9th Cir. 1978) and *NLRB v. S & S Product Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir. 1975).

Instead, the Ninth Circuit has gone to the opposite extreme. Rather than recognizing the dangers inherent in placing an unexplained fee waiver on a document which, if signed without being understood completely, could paint a false picture of support and further could compel bargaining without an election, the court instead establishes a virtual presumption of propriety. Moreover, the decision suggests that this presumption can be overcome only if the union confesses to a violation of *Savair* by expressly limiting the availability of the waiver to the pre-election period.

This decision eviscerates *Savair*. Hereafter in this circuit, unions can artificially inflate pre-election support by placing a fee waiver offer directly on their authorization card and then "unambiguously omitting" reference to the pre-election limitation.

Moreover, the Ninth Circuit's decision in this case conflicts with decisions in other circuits. Thus, in the absence of any evidence offering a timely explanation of the waiver's terms, the court presumed that the waiver was not limited to the pre-election period. Although other circuit courts, citing dictum from the *Savair* decision, have held that waiver offers which are unlimited as to time are permissible, see *e.g., NLRB v. Whitney Museum of American Art*, 636 F.2d 19, 21 (2d Cir. 1980), and *NLRB v. Con-Pac, Inc., supra*, cases sustaining a union's pre-election conduct against an alleged *Savair* violation are generally based on a record which clearly supports the union's claim that its waiver offer was not conditioned on pre-election support. See *e.g., Solon Manufacturing Co. v. NLRB*, 544 F.2d 1108 (1st Cir. 1976) ("no initiation fee for charter members"); *NLRB v. Whitney Museum of Art, supra; NLRB v. Con-Pac, Inc., supra; NLRB v. S & S Product Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir. 1975); *Certain-Teed Products Corp. v. NLRB*, 562 F.2d 500 (7th Cir. 1977) (Union pamphlet stating that fee will be waived for a "certain period of time after the election"); and *NLRB v. Wabash Transformer Corp.*, 509 F.2d 647 (8th Cir. 1975).

Although the Ninth Circuit found the terms of the union's waiver offer to be acceptable and unambiguous, it nevertheless stated in *dictum*:

> "Even if the offer was ambiguous, reasonable interpretation would not suggest that the waiver was conditioned upon pre-election support" (Appendix A, p. 2).

By concluding that an employee cannot reasonably interpret an unexplained waiver offer appearing on an authorization card as being available only to employees who return the card prior to the election, the Ninth Circuit ignores the fact that regardless of their objective, authorization cards serve

only a pre-election function. They have no use, and, therefore, are unavailable as a means of obtaining a fee waiver after an election.

If a sufficient number of cards are collected, the union can demand to bargain without an election. Thereafter, if recognition is granted, it need not collect additional cards since it has already achieved representative status. If an election is held and the union wins, it will be certified as the bargaining representative on the basis of the election results. Again, further solicitation of authorization cards is unnecessary. Finally, if an election is held and the union loses, Section 9(c)(3) of the Act would operate to prohibit another election for at least 12 months, and initiation fees are a moot issue.

Thus, under each of the possible outcomes of an election campaign, there is no likelihood that a union would continue to distribute or solicit authorization cards after the election. This fact would be easily understood by employees who receive cards similar to the Union's herein. Confronted with such a card, it is also clear that the employee would conclude that in order to be eligible for the fee waiver, he or she must sign and return the card immediately, or at least before the card is rendered superfluous by the election process.

By application of a rule that is clearly inconsistent with the decisions of this Court and of other circuits, the Ninth Circuit has sanctioned pre-election conduct that violates the *Savair* rule.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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